No. 84-249

In the Supreme Court of the United States

October Term, 1984

ROGER L. SPENCER, ET UX,
PETITIONERS,

v.

SOUTH CAROLINA TAX COMMISSION, ET AL.,
RESPONDENTS.

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

In this case, the South Carolina Supreme Court refused to consider Roger and Shirley Spencer's claim under 42 U.S.C. §§ 1983 and 1988. This refusal was wrong. Section 1983 "gave a federal cause of action to ... taxpayers." Fair Assessment In Real Estate Association v. McNary, 454 U.S. 100, 103-104 (1981). State courts have concurrent jurisdiction over these claims. Martinez v. California, 444 U.S. 277, 283 n.7 (1980); Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980). Under Testa v. Katt, 330 U.S. 386 (1947), the South Carolina courts were obligated to exercise their jurisdiction to enforce the Spencers' federal claim.

In seeking to defend the lower courts' refusal to enforce the Spencers'

federal rights, respondents make three principal arguments. They say (1) that Congress eliminated the Spencers' § 1983 claim by enacting the Tax Injunction Act, 28 U.S.C. § 1341; (2) that even if the Spencers have a § 1983 claim, Testa did not obligate the state courts in this case to enforce it because they lacked jurisdiction to do so under state law; and (3) that, in any event, the Spencers' federal claim is barred by principles of sovereign immunity.

These contentions lack merit. The plain language and legislative history of the Tax Injunction Act show that it was enacted only to restrict federal court jurisdiction and not to displace rights or remedies provided by federal law. South Carolina state law shows that the lower courts had "general

jurisdiction" to enforce the Spencers' federal claim. Moreover, Testa itself shows that the "lack of jurisdiction" exception has no application here. Finally, Hutto v. Finney, 437 U.S. 678 (1978), and other decisions of this Court show that sovereign immunity does not bar the Spencers' claim for fees under § 1988, and, in any event, the state statute permitting suits for refunds has waived sovereign immunity.

1. The Tax Injunction Act does not strip the Spencers of the protections of §§ 1983 and 1988.

Respondents[1] and amici insist

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[1] In this reply brief, citations to the brief for respondents will be indicated as "Resp. Br. ___," to the brief for petitioners as "Petr. Br. ___," to the amicus brief of the Council of State Governments, et al., as "Council Br.," to the amicus brief of the Attorney General of the Commonwealth of Massachusetts, et al., as "State Atty. Gen. Br. ___," to the appendix to the petition for

that the Tax Injunction Act and the policies it represents limit taxpayers to the remedies that are available under state law[2] and "[bar] a claim for a tax refund under § 1983."[3] Respondents attempt to alarm the Court by suggesting that § 1983 suits in state court will devastate state tax systems and create "precisely the result § 1341 was meant to cure."[4] These contentions are incorrect. There is no cause for alarm if the Spencers prevail. Rather if the Spencers do not prevail, the purpose of §§ 1983 and 1988 will be defeated.

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certiorari by "App. ___ at ___," to the transcript of record filed in the South Carolina Supreme Court by "R. __".

[2]Council Br. at 11.

[3]State Atty. Gen. Br. 17 (quoting Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370, 374 (1976)).

[4]Resp. Br. at 55.

A. The language and legislative history of the Tax Injunction Act show that Congress did not intend to prevent the assertion of §§ 1983 and 1988 claims in state courts. The arguments of respondents and amici distort the plain meaning and legislative history of the Tax Injunction Act. The plain language of this short statute makes its limited purpose clear:

> [t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341 (emphasis added).

Like the statute in Dickman v. Commissioner, 104 S. Ct. 1086, 1089 (1984), the language of § 1341 "is clear and admits of but one reasonable interpretation." By its express terms,

the Act does no more than deprive federal courts of jurisdiction in specified cases; it says nothing whatsoever about limiting the duties of state courts to enforce federal rights.

In referring to a "plain, speedy and efficient" remedy, Congress did not, as amicus suggests, "establish an alternative remedial structure"[5] remotely analogous to the elaborate federal statutory schemes considered in Smith v. Robinson, 104 S. Ct. 3457 (1984), and Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981).[6] As the Act makes clear, Congress simply required that

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[5]Council Br. 11.

[6]The federal statutes that displaced § 1983 in those cases were comprehensive and detailed and granted congressionally crafted remedies as part of a broad general scheme directed at specific problems.

state procedures be adequate to enforce claims based on both federal and state law before stripping the federal courts of jurisdiction. See Rosewell v. LaSalle National Bank, 450 U.S. 503, 515 n.19 (1981). Respondents and amici ignore this plain language when they argue that the Act limits the rights and remedies of taxpayers who sue in state courts.[7]

The legislative history of the Act confirms that it was not intended to

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[7]Respondents' and amicus' argument based on the State and Local Fiscal Assistance Act of 1972, 26 U.S.C. §§ 6361-6365, see Resp. Br. 64-68, and 26 U.S.C. § 7430, see Council Br. 6-7, is even more farfetched. The terms on which Congress is willing to collect income taxes for states, 26 U.S.C. §§ 6361-6365, have nothing to do with the Spencers' right to bring this §§ 1983 and 1988 action in state court. Moreover, Congress has not amended § 1988 to impose in § 1983 actions the restrictions which 26 U.S.C. § 7430 places on attorney's fees in disputes with the Internal Revenue Service. Congress's decision not to impose those limits on fee awards in §§ 1983 and 1988 actions must be respected.

limit taxpayers to remedies provided by state law. The Senate Report on § 1341 described it as simply amending the "Judicial Code .... with respect to the jurisdiction of the district courts ... over suits relating to the collection of State taxes." S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937). Senator Bone, who introduced the Tax Injunction Act, called it "a very short bill" designed to alter "the jurisdiction of district courts." 81 Cong. Rec. 1415 (1937). He emphasized that "the bill [did] not take away any equitable right of a taxpayer, or deprive him of a day in court." Id. at 1416. The Act passed with little debate. There is no evidence that Congress believed it was doing anything more than limiting the

jurisdiction of federal courts.[8]

The absence of such evidence is not surprising because to achieve its purpose Congress did not have to do anything more than remove federal jurisdiction over state tax matters. Prior to the enactment of the Tax Injunction Act, federal courts had become "free and easy with injunctions"[9] in tax cases for two reasons. First, the Eleventh Amendment often prevented federal courts from providing a remedy at law thus justifying the issuance of federal court

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[8]This Court has repeatedly observed that the purpose of the Tax Injunction Act was "'to limit drastically federal district court jurisdiction to interfere with ... the collection of taxes.'" California v. Grace Brethren Church, 457 U.S. 393, 408-409 (1982) (quoting Rosewell v. LaSalle National Bank, 450 U.S. 503, 522 (1981)).

[9]McNary, 454 U.S. at 129 (Brennan, J., concurring) (quoting England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 431 (1964) (Douglas, J., concurring)).

injunctions not available in state courts; second, the federal courts had failed to apply strictly the principle of comity that otherwise limited federal court jurisdiction.[10] The problem was complicated further because foreign corporations through diversity jurisdiction were able to secure more favorable remedies in federal courts than were available to citizens of a state in that state's courts. S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). In the Tax Injunction Act, Congress responded to these concerns simply by removing the jurisdiction of federal courts. Solving these problems did not require Congress to alter state court jurisdiction over

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[10] McNary, 454 U.S. at 129 n.15, 130 (Brennan, J. concurring) (quoting S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937) and 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone)).

federal claims, and Congress did not do so.[11]

The decisions of this Court show the error of respondents' contrary reading of the statute. The Court specifically acknowledged the appropriateness of § 1983 tax actions in state court in

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[11] Respondents' reliance on the Tax Injunction Act is also ill-founded because the Act applies to requests to "enjoin, suspend or restrain the assessment, levy or collection of taxes ...." (emphasis added). As this plain language suggests, the statute does not even apply to damage claims. See Northwood Apts. v. LaValley, 649 F.2d 401, 404-05, vacated and remanded on other grounds, 454 U.S. 1118 (1981), on remand, 673 F.2d 159 (6th Cir. 1982); Fulton Mkt. Cold Storage Co. v. Cullerton, 582 F.2d 1071, 1078-1079 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979). To be sure, comity often requires federal court deference to state tax procedures when damages are sought. McNary, 454 U.S. at 113-115. Such a common- law rule, however, is a far cry from the elaborate statutory schemes held to "repeal" or "replace" § 1983 in National Sea Clammers, supra, and Smith v. Robinson, supra. See Smith, 104 S. Ct. at 3469. It is far-fetched to argue that § 1341 "repeals" § 1983's provision for damage actions when § 1341 does not apply to damage claims at all.

Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984). There the Court declared that:

> [c]hallenges to the validity of state tax systems under 42 U.S.C. § 1983 ... must be brought in state court.

Id. at 920 (emphasis added). It would be logically inconsistent to require federal taxpayers to bring § 1983 tax actions in state court and then to hold that the Tax Injunction Act forecloses such actions.

In Rosewell, the Court held that under § 1341, to avoid federal court interference, a state must afford "'full protection to ... federal rights.'" 450 U.S. at 513 (quoting Hillsborough v. Cromwell, 326 U.S. 620, 625 (1946)). The state cannot reasonably argue that it is fully protecting the Spencers' federal rights in accord with § 1341 when it relies on § 1341 to deny them

their federal rights under §§ 1983 and 1988.

B. Respondents are also wrong to suggest that requiring state courts to enforce § 1983 will disrupt state tax systems. Respondents predict that, unless the Tax Injunction Act is read to foreclose enforcement of § 1983, dire consequences will ensue. They say taxpayers will be able to settle disputes "by injunction" and circumvent state administrative remedies.[12] These predictions, however, do not stand up under analysis.

Although they point to no possibility of disruption in this case, respondents fear that the availability of a § 1983 claim in other lawsuits will result in widespread injunctions against

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[12] Resp. Br. 59.

collection of state taxes. These injunctions, they say, will frustrate the basic state policy of generally permitting only suits for refunds in order to protect the public fisc.

Respondents' fears have no basis. The feared injunctions will not issue. Injunctive relief is available only if there is no adequate remedy at law.[13] This principle applies fully in § 1983 actions.[14]

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[13]See e.g., Toomer v. Witsell, 334 U.S. 385, 392 (1948); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2942 at 368-369 (1979); and cases discussed in n.15 infra.

[14]Section 1983 does not require injunctive relief unless there is no adequate relief at law. See Allee v. Medrano, 416 U.S. 802, 814 (1974); Bonner v. Circuit Court, 526 F.2d 1331, 1335-1336 (8th Cir. 1975), cert. denied 424 U.S. 946 (1976). Moreover, this Court has made it clear that injunctions in § 1983 actions must be used "sparingly" and with respect for the need for governments to be able to have control over the conduct of their affairs. See Rizzo v. Goode, 423 U.S. 362, 378 (1976). If there is any doubt that this

When a state has provided for a "plain, speedy, and efficient" refund, it will be difficult, if not impossible, to obtain an injunction under § 1983. The very refund actions which respondents say are threatened by § 1983 injunctions will provide an adequate remedy and prevent injunctions. This Court and the South Carolina courts have repeatedly denied requests for injunctions on the ground that a refund is an adequate remedy at law.[15] Respond-

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rule applies in § 1983 tax actions in state court, this Court can remove it simply by so declaring. Such a rule would provide a far more suitable response to respondents' generalized fear of injunctions than foreclosing § 1983 claims altogether.

[15]See, e.g., Toomer v. Witsell, 334 U.S. at 392; Textile Hall Corp. v. Riddle, 207 S.C. 291, 300, 35 S.E.2d 701 (1945) (quoting Chesterfield County v. State Highway Dep't, 191 S.C. 19, 53, 3 S.E.2d 686 (1939)) ("[A] taxpayer may enjoin the collection of an illegal tax, provided he ... [has] no adequate legal remedy ..., but ... [state statutes] provide a full, adequate and complete legal

ents' concern about widespread injunctions under § 1983 is thus illusory.

In the rare cases where there is no adequate remedy at law for unconstitutional or illegal taxation, injunctive relief should be available in state court whether § 1983 is invoked or not. If an injunction is necessary to provide a "plain, speedy, and efficient" remedy for a violation of federal rights, federal courts must provide it if the state courts do not. The Tax Injunction Act does not prevent injunctions against state taxes when injunctions are the only possible remedy. In fact, when it enacted the Tax Injunction Act, Congress

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plete legal remedy by payment under protest and a suit to recover .... That the legal remedies thus provided are adequate and exclusive has been so frequently decided as to render citation of authority superfluous."); Fleming v. Power, 77 S.C. 528, 530 58 S.E. 430, 431 (1907).

anticipated that state courts would grant injunctions in some tax cases.[16] Respondents' argument regarding injunctions does not justify wholesale abandonment of § 1983 in virtually all tax cases.

Respondents similarly err in two respects when they suggest that § 1983 suits will allow taxpayers routinely to circumvent state administrative remedies. First, in South Carolina for example, courts do not require exhaus-

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[16]The Senate Report regarding the Tax Injunction Act specifically noted that injunctions were available in state courts when a "tax law is invalid or the property is exempt from taxation." S. Rep. No. 1035, 75th Cong., 1st Sess. 1. In addition, "[a]s originally enacted, the statute deprived the district courts of jurisdiction wherever a 'plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.' 50 Stat. 738 (emphasis added). The phrase 'at law or in equity' was dropped as 'unnecessary' in the 1948 revision of the statute." Rosewell, 450 U.S. at 534 n.7.

tion at all in tax cases like this one, where only legal issues regarding "illegality and/or unconstitutionality" of state tax practices or statutes are involved. Andrews Bearing Corp. v. Brady, 261 S.C. 533, 536-537, 201 S.E.2d 241, 243 (1973). Therefore, in many if not most § 1983 tax cases, circumvention of administrative remedies will not be an issue.

Second, respondents' argument assumes that administrative remedies need not be exhausted in connection with a § 1983 state court tax case. That assumption, however, is not a settled proposition. Patsy v. Board of Regents, 457 U.S. 496 (1982), involved neither an action in state court nor a challenge to state taxes. Indeed, Justice Brennan's concurring opinion in McNary, 454 U.S.

at 133-138, together with the majority, concurring, and dissenting opinions in Patsy, suggest that the exhaustion of administrative remedies might be required in § 1983 tax actions.

In any event, as with respondents' contention with respect to injunctions, respondents overreach in arguing that possible interference with exhaustion requirements justifies dispensing altogether with § 1983 relief. If respondents' concerns are justified and sufficiently weighty, the proper course is to uphold state exhaustion rules in § 1983 state court tax cases, rather than to hold § 1983 unavailable altogether.

C. Respondents' argument not only distorts the Tax Injunction Act but also undermines the important national policies underlying §§ 1983 and 1988.

Respondents' misinterpretation of the Tax Injunction Act would eliminate a right conferred by § 1983. Section 1983 was designed to "[create] a new federal cause of action," Allen v. McCurry, 449 U.S. 90, 99 (1980), and to "override certain kinds of state laws," Monroe v. Pape, 365 U.S. 167, 173 (1961).[17]

[17]Relying on the section's legislative history, respondents and amici also argue that § 1983 was designed only to create federal court jurisdiction to remedy state infringments of constitutional rights. It follows, they say, that no intent to compel state courts to assume jurisdiction in § 1983 cases can be inferred. This reading of § 1983 is, however, too narrow. Given that § 1983 was also had other purposes, it is obvious that Congress intended that state courts should have to apply § 1983. As noted in Thiboutot, prior to elimination of the jurisdictional amount requirement in federal question cases, there was a broad class of § 1983 cases that could be brought only in state courts. 448 U.S. at 11 n.12. State courts remain the only forum for most § 1983 claims involving state taxation. McNary, 454 U.S. at 116. If the respondents arguments were correct, then Congress would have enacted § 1983 without making any provision for the enforcement of a

The plain language of § 1983 clearly includes among its intended beneficiaries:

> taxpayers, or anyone else who was able to prove that his constitutional or federal rights had been denied by any State.

McNary, 454 U.S. at 103-104 (emphasis added).

This Court in McNary held that "taxpayers [who attack state tax statutes] must seek protection of their federal rights" in state courts and went on to note that "a § 1983 claim

substantial class of claims under that statute for almost 100 years; Congress also would have provided taxpayers a § 1983 cause of action but would have failed to enable them to assert it. There is no reason to assume that Congress left any § 1983 claims so that they could be rendered unenforceable at the whim of state courts. See Petr. Br. at 31-34, 40-42.

[could be asserted] in state court." Id. at 116. Having recognized that § 1983 extends protection to taxpayers, this Court should not now withdraw that protection by accepting respondents' tortured reading of the Tax Injunction Act.

Nor should the Court look to the vague intimations of Congressional intent respondents seek in § 1341 in order to withdraw the right to attorney's fees created by § 1988, a specific and recent act of Congress. Congress enacted § 1988 to provide attorney's fees to people just like the Spencers who would not otherwise be able to enforce their constitutional rights.[18] There is no evidence that Congress intended to exempt instances of unconstitutional

[18] See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) and Petr. Br. 43-50.

state taxation from the fees remedy provided by § 1988.

Unconstitutional taxation is no less serious than other deprivations of constitutional rights.[19] Respond-

[19] In addition to their successful privileges and immunities claim, the Spencers alleged violations of the equal protection and due process clauses of the Fourteenth Amendment, R. 12-13. The state supreme court did not address these additional allegations, App. A at 9a, but its holding that there is no justification for the statute's discrimination establishes the validity of the Spencers' equal protection and due process claims. See Memorial Hospital v. Maricopa County, 415 U.S. 250, 253-262 (1974); Jones v. Helms, 452 U.S. 412, 418-419 (1981); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). The assertion of amicus, State Atty. Gen. Br. 20-26, that § 1983 may not be used to enforce the privileges and immunities clause of Article IV of the Constitution is, therefore, irrelevant. In addition that assertion is erroneous because it ignores the clear language of § 1983. As noted in Lynch v. Household Finance Corp., 405 U.S. 538, 549 and n.16 (1972), the phrase in § 1983 "rights, privileges or immunities secured by the Constitution and laws" means what it says. § 1983 embraces the Spencers rights under the privileges and immunities clause. There is no distinction "between personal liberties and property rights." Id. at 542; cf. Thiboutot, 448 U.S. at 4.

ents' arguments would allow state officials to get away with imposing small but unconstitutional taxes on blacks, aliens or other groups just because the expense of attacking those taxes is prohibitive. This is exactly what Congress intended to avoid by enacting § 1988.

In Maine v. Thiboutot, 448 U.S. at 11, the Court recognized that Congress intended for § 1988 to provide for fees in state courts. In addition, the Court emphasized the special need for fees in state court cases like this one where access to federal courts is restricted. See also McNary, 454 U.S. at 117. It said:

> [i]f fees were not available in state courts, federalism concerns would be raised.... [G]iven that there [are] cases stating causes of action under § 1983 but not cognizable in federal court ... some plaintiffs would be forced to go to state courts, but contrary to congressional intent, would still face financial disincentives to asserting their claimed deprivations of federal rights.

Thiboutot, 448 U.S. at 11 n.12 (emphasis added). Congress intended for § 1988 to eliminate financial disincentives in cases like this one.[20]

It is especially ironic that respondents seek to frustrate the policies of § 1988 in this case. Respond-

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[20]Section 1988 was intended to make it clear that the "American Rule" regarding attorney's fees does not apply when the violation of constitutional rights is involved. Hensley v. Eckerhart, 461 U.S. at 429. "The discretion of the ... court in deciding whether to award attorney's fees to a prevailing party is narrowly limited." Bonnes v. Long, 599 F.2d 1316, 1318 (4th Cir. 1979) cert. denied, 455 U.S. 961 (1982). To discourage frivolous suits, § 1988 itself authorizes fee recoveries against plaintiffs who institute baseless actions. See Hensley v. Eckerhart, 461 U.S. at 429 n.2; Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). There is no special reason not to apply section 1988 in tax cases.

ents' argument for curtailing the availability of § 1988 fees in this case rests on vaguely perceived threats to state injunction and exhaustion rules. The Spencers, however, exhausted administrative remedies, and they neither sought nor received injunctive relief.

2. The state trial court had adequate jurisdiction to consider the Spencers' federal claim.

Respondents contend[21] that the trial court was not obligated under Testa to entertain the Spencers' § 1983 claim because its jurisdiction was not "adequate and appropriate" under state law. See Testa, 330 U.S. at 394. Respondents, however, have misinterpreted state law. The South Carolina Constitution and the decisions of the

[21] See Resp. Br. 13-45.

South Carolina Supreme Court establish that the trial court's jurisdiction is sufficient to obligate it to entertain the Spencers' federal claim.

The trial court in this case is a court of general jurisdiction. It has the power under the South Carolina Constitution to entertain any civil action. Article V, § 7, of the Constitution of South Carolina declares that the trial court in this case is

> a general trial court with original jurisdiction in civil and criminal cases.

The South Carolina Supreme Court has held repeatedly that "the [l]egislature cannot take away" this "constitutionally granted [judicial] power." State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982); Strickland v. Seaboard Air Line Ry Co., 112 S.C. 67, 69, 98 S.E. 853 (1919).

Trial courts in South Carolina clearly have the jurisdictional power to grant monetary awards, declaratory relief, and attorney's fees.[22] They routinely grant these types of relief to those entitled to receive them. In this case, both the trial court and the state supreme court exercised their jurisdiction to declare the tax statute void and grant the refund as requested under § 1983.[23]

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22 See Petr. Br. 58 n.23

23 Although respondents insist that the trial court lacked the jurisdiction to declare the state tax statute at issue unconstitutional, the trial court's order states that the statute "is hereby declared unconstitutional and as a result of this order is null, void and of no effect." App. B. at 19(a). The South Carolina Supreme Court affirmed. App. A. at 9(a), 11(a). Fleming v. Power, 77 S.C. 528, 531, 58 S.E. 430, 431 (1907), acknowledges that in South Carolina a taxpayer who seeks to recover taxes paid as a result of an unconstitutional statute may also obtain a declaration that the statute is unconstitutional.

The general jurisdiction of the trial court in this case is exactly the kind of jurisdiction that this Court found sufficient in Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1, 57 (1912). Reasoning that the Connecticut courts in that case were "courts of general jurisdiction," Mondou held that the state courts were obligated to entertain and enforce claims under the Federal Employers Liability Act ("FELA") even though the FELA provided a remedy in some circumstances where state law did not. See 223 U.S. at 49-50, 56, 57-58.

Despite the clear general jurisdiction of the trial court under state law, respondents contend that two state statutes deprive the trial court of jurisdiction over the Spencers' § 1983 claim.

Those statutes are S.C. Code Ann. § 12-47-10[24] and S.C. Code Ann, § 12-47-50.[25] Respondents' reliance

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[24] § 12-47-10 provides:

> The collection of ... taxes ...shall not be stayed or prevented by any injunction, writ or order issued by any court or judge. And no writ, order or process of any kind whatsoever staying or preventing the Tax Commission or any officer of the State charged with a duty in the collection of taxes from taking any steps or proceeding in the collection of any tax, whether such tax is legally due or not, shall in any case be granted by any court or the judge of any court.

[25] § 12-47-50 provides:

> There shall be no other remedy than those provided in this chapter in any case of the illegal or wrongful (a) collection of taxes, (b) attempt to collect taxes or (c) attempt to collect taxes in funds or moneys which the county treasurer shall be authorized to receive under the law other than such as the person charged with such taxes may tender or claim the right to pay.

(emphasis added)

on these statutes to establish the "lack of jurisdiction" exception to Testa fails as a matter of state and federal law.

As a matter of state law, those statutes do not limit the jurisdiction of the trial court. They simply specify and limit the remedies that are available in those courts under state law. Indeed, the South Carolina Supreme Court upheld the constitutionality of the predecessor of § 12-47-10 in State v. County Treasurer, 4 S.C. 520, 530-32 (1873), because the statute d'd not limit jurisdiction but only took away "an existing remedy." 4 S.C. at 530. The court recognized that the legislature could "establish, change or abolish any remedy" under state law without infringing on "the possession of full jurisdic-

tion by a Court." Id. at 531. If §§ 12-47-10 and 12-47-50 were, as respondents contend, limits on the jurisdiction of the trial court, those statutes would violate the state constitution.[26]

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[26]Respondents' argument that §§ 12-47-10 and 12-47-50 impose jurisdictional limits is based on a misinterpretation of numerous opinions of the South Carolina Supreme Court. The decisions cited by respondents which actually refused relief did so because the plaintiff was not entitled to it rather than due to a lack of jurisdiction. See, e.g., cases cited in footnote 15 and Santee River Cypress Co. v. Query, 168 S.C. 112, 114, 119, 167 S.E. 22 (1932) (the members of tax commission were "enjoined from the collection of ... tax until the merits have been determined." The court declared that courts have "the duty ... to enjoin the collection of an illegal tax in those cases where no adequate legal remedy is provided for the aggrieved taxpayer."); Sutton v. Fort Mill, 171 S.C. 291, 295, 172 S.E. 119 (1933); Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 215, 58 S.E. 811, 812 (1907); Aetna Fire Ins. Co. v. Jones, 78 S.C. 445, 447, 456, 59 S.E. 148, 152 (1907). The statement that the court in Elmwood Cemetery Ass'n v. South Carolina Tax Comm'n, 255 S.C. 457, 462, 179 S.E.2d 609, 611 (1971), was "without jurisdiction to determine the liability of" the taxpayer for future years did not mean that the trial court lacked judicial power to do so. Perpetual Bldg. & Loan Ass'n v. South Carolina Tax Comm'n, 255 S.C. 523, 526-527, 180 S.E.2d 195, 197 (1971), and Elmwood Cemetery Ass'n v. Wasson, 253 S.C. 76, 78, 169 S.E.2d 148 (1969), make it clear that declaratory relief was denied the plaintiff in the Elmwood Cemetery case because the plaintiff was "not entitled to any relief by way of declaratory judgment" under state law. 255 S.C. at 527, 180 S.E.2d at 197.

As a matter of federal law, no matter what label is placed on these statutes, they do not establish the "lack of jurisdiction" exception to Testa. These statutes represent state remedial policy. They are no different from the policy against enforcing penal statutes of other governments involved in Testa. Respondents' argument that the trial court in this case lacked jurisdiction is only another version of the policy argument rejected in Testa.

When stripped of its jurisdictional camouflage, respondents' position is

that in tax cases the South Carolina courts do not have to grant any relief other than that authorized by the state legislature. This position directly discriminates against federal remedies. Testa squarely rejected this type of argument.[27]

There is no doubt that the state courts in this case would have jurisdiction to enforce statutes like §§ 1983 and 1988 if the state legislature were to enact them. Those courts, therefore, must enforce §§ 1983 and 1988 in this case.

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[27]This Court rejected a similar attempt by a state court to escape its constitutional obligation to enforce claims within its jurisdiction in Broderick v. Rosner, 294 U.S. 629, 643 (1935).

3. Sovereign immunity does not permit the state courts to reject the Spencers' §§ 1983 and 1988 claims.

There is no significant issue regarding sovereign immunity in this case. The Spencers have obtained all the relief they sought except for attorney's fees.

In Hutto v. Finney, 437 U.S. at 693-694, the Court held that Congress intended § 1988 to permit fee recoveries from state treasuries, even in federal court cases where the Eleventh Amendment applies. Thus, Hutto makes it clear that sovereign immunity is no defense to the Spencers' claim for attorney's fees under § 1988. Respondents seek to circumvent Hutto by arguing that sovereign immunity bars any underlying § 1983 relief, so that § 1988 cannot apply.

This argument fails for two reasons.

First, there is no sovereign immunity to the Spencers' successful claim for declaratory relief against the individual defendants sued in their official capacity. This Court's decisions in Pennhurst, Quern, Edelman, and Ex parte Young all make it clear that sovereign immunity did not prevent the Spencers from having the state statute declared unconstitutional.[28]

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[28] Ex parte Young, 209 U.S. 123, 159-160 (1908), established that when a state official acts under the authority of a state law which is alleged to be unconstitutional, the "state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." The federal court in Young was entitled to decide "the question of unconstitutionality" under the Federal Constitution without regard to any sovereign immunity asserted by the state. Edelman v. Jordan, 415 U.S. 651, 666-668, 677 (1974), and Quern v. Jordan, 440 U.S. 332, 337, 345 (1979), both reaffirmed the vitality of the principle of Ex parte Young. More recently in Pennhurst, 104 S. Ct. at 909, this Court noted that under the "holding in Ex parte Young," "a suit challenging the constitutionality of a state official's action is not one against the State."

Declaratory relief was available under § 1983, and the Spencers obtained the declaration of unconstitutionality that they sought. Under Hutto and Maher v. Gagne, 448 U.S. 122, 132 n.15 (1980), therefore, the Spencers are entitled to attorney's fees under § 1988 regardless of whether sovereign immunity bars their refund claim. As the Court declared in Pulliam v. Allen, 104 S. Ct. 1970, 1982 (1984) (quoting H. R. Rep. No. 94-1558, p. 9 (1976)), the "legislative history of [§ 1983] confirms Congress' intent that an attorney's fee award be available even when damages would be barred or limited by 'immunity doctrines and special defenses.'"

Second, in any event, the state has statutorily waived its sovereign immunity with respect to the Spencers' claim for a refund. The Spencers brought their § 1983 suit in accord with the procedures of S.C. Code Ann. § 12-47-220. That statute plainly states that:

> Any person paying any taxes under protest may ... after making such payment, ... bring an action against ... the Commission ... for the recovery thereof.

The South Carolina Supreme Court has declared that this statute is a waiver of sovereign immunity permitting an action, in accord with the requirements of the statute, against the state "to recover taxes unjustly or illegally taken." Bomar v. City of Spartanburg, 181 S.C. 453, 463, 187 S.E. 921 (1936).

The opinion of the state supreme court below confirms that there is no genuine sovereign immunity issue in this case. That court did not even suggest that the Spencers' § 1983 claim was barred by sovereign immunity. Indeed, the court granted the Spencers the refund and declaratory relief they had sought under § 1983. Respondents did not attempt to bring the issue of sovereign immunity to the court's attention. Their brief to the state supreme court had abandoned the issue.[29]

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[29]Although respondents listed sovereign immunity as an additional sustaining ground for the trial court's opinion, R. 161, the respondents abandoned that ground, by failing to argue it in their brief. See Rule 1 §§ 3(A) and (C) and Rule 4 §§ 6 and 8 of the Rules of the Supreme Court of South Carolina, 22 S.C. Code Ann. (1977 and Supp. 1983); cf. State v. Givens, 267 S.C. 47, 52 S.E.2d 867 (1976).

CONCLUSION

Despite the arguments of respondents, it is clear that Congress intended for people like the Spencers to have the benefit of fees under § 1988 in a case like this. For the reasons expressed in their initial brief and this reply brief, the Spencers respectfully request that the portion of the judgment of the South Carolina Supreme Court rejecting their claim of attorney's fees under §§ 1983 and 1988 be reversed.

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Respectfully submitted,

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